In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1223

WENDELL GILBERT COOPER, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of knowingly making false real estate appraisals and statements to the Federal Housing Administration (18 U.S.C. 1010) and conspiracy (18 U.S.C. 371). He was sentenced to concurrent prison terms of one year and a day. The court of appeals affirmed by order (Pet. App. 36) and thereafter denied a motion for rehearing on December 8, 1970. The petition for a writ of certiorari, filed on January 9, 1971, is out of time under Rule 22(2) of this Court's Rules. The issues raised, concerning evidentiary

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rulings and denial of motions for change of venue, do not, in any event, warrant review by this Court.

1. Petitioner was employed as a real estate appraiser for the Federal Housing Administration (I Tr. 128–129, III Tr. 542–543).[1] His primary duty was to evaluate homes in Northern Kentucky that were to be sold to prospective buyers needing FHA-insured loans (III Tr. 542–544). Petitioner, Ardmore Realty Co., and its president, Steinberg, were charged[2] with making and conspiring to make false statements and appraisals for the purpose of influencing action by the FHA (Pet. App. 21–29). Transactions involving five separate parcels of real-estate were charged as overt acts in furtherance of the conspiracy.

The proof at trial showed that at various times between January and April 1968, Ardmore Realty purchased the five parcels. Petitioner appraised the properties at amounts ranging from $5,200 to $6,900 above the selling prices and then submitted the appraisals to the FHA. Ardmore meanwhile advertised the properties and found interested buyers who, in turn, obtained loans from the mortgage broker (Kissell) contingent upon FHA approval (See II Tr. 340–352, 374, III Tr. 496–500, 518, 521–523, 529–530). The mortgage broker submitted a statement of the buyer's credit standing prepared by the real estate company (II Tr. 340–352) and the FHA eventually committed

[1] "Tr." refers to the four-volume transcript of the trial proceedings, a copy of which we are lodging with the Clerk.

[2] A mortgage broker, Kissell Company, and Robert Wren of that company were named as co-conspirators, but not indicted. Prior to trial, Steinberg and Ardmore Realty pleaded guilty.

itself to insuring the loans for the inflated value (I Tr. 154–155, 165–166, 173, 188, 192–193, 216–217, 230).

In order to show petitioner had over-valued the properties, the government called their original owners, who testified to the amount they received, a total of about $45,000, when the real estate company purchased the parcels (III Tr. 489–491, 506–508, 513–514, 526–527, 534–535). Petitioner's appraisals, which were made soon after the sales and totalled about $75,000, also were introduced (I Tr. 140, 143, 160–164, 183–186, 208–210, 226–228). The government further introduced testimony of two other FHA appraisers who estimated the fair market value of the properties. Robert Daniels gave estimates as to three parcels (III Tr. 407–415), while Charles Card estimated the value of all five (III Tr. 438–444).

Petitioner sought to impeach Card on cross-examination with a purported prior inconsistent statement contained in a letter Card had written (III Tr. 456). The trial court refused to permit the letter to be introduced (III Tr. 457). This ruling was correct. The letter (Pet. App. 34–35) had been written on April 17, 1968 in response to a Congressional inquiry. It explained a table compiled by another employee of the FHA, listing the sales prices, the FHA valuation, FHA commitments, and other information on most of the homes that had been appraised in Northern Kentucky since January 1, 1968. There was nothing in the letter suggesting that Card himself had made any appraisals or that he was satisfied with those made by petitioner. It is thus clear that the letter contained no impeachment material.

2. The government introduced evidence that petitioner had made a false statement in an FHA document concerning the physical appearance of one of the five properties. Petitioner had written, on January 26, 1968, that the house had a "new furnace, water heater * * * [and was] newly painted on exterior * * *" (I Tr. 211). The government introduced several photographs of the property, taken June 13, 1968, which showed its true, dilapidated appearance (IV Tr. 697–702). Petitioner contends that the pictures should not have been admitted unless the government made a showing that the condition of the property had not changed between January 26 and June 13. In the circumstances, however, it was not error to admit the photographs without such a showing.[3] There was scant likelihood that natural deterioration or vandalism in that relatively short period could account for the wide discrepancy between the report and the photographs. Moreover, the person who sold the property to the real estate company in February or March, 1968 testified that, at the time of sale, paint which had been applied to the house three years before had begun to peel off the frame; that the water heater was a year old; and that the furnace was three to four years old (III Tr. 515–516).

3. Prior to and again at trial, petitioner moved for a change of venue on the ground that pre-trial news coverage would deprive him of a fair trial. These

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[3] The case, *Griffin* v. *Ensign*, 234 F. 2d 307 (C.A. 3), which petitioners claim conflicts with the ruling below, is factually quite different. The ruling there dealt with a photograph of a truck taken the day after an accident in which it was involved.

motions were properly denied (Pet. App. 31–34; I Tr. 54–55). The publicity to which petitioner objected consisted of adverse stories and editorials between May and October, 1968 (Pet. 13–14, Pet. App. 33). The trial began in October, 1969. Twenty-two jurors were examined as to the prior publicity on *voir dire* (I Tr. 1–98). Seven recalled nothing about the case. Twelve remembered reading about it, but said they had never formed an opinion as to guilt or innocence. Of these, some recalled certain details, while others merely had seen headlines. The remaining three had read or heard about the case and stated that they had formed an opinion about petitioner's guilt or innocence; they were excused by the court.

The full year intervening between the publicity and the trial significantly diminished the ability of the jurors to recall the substance of the publicity. Moreover, no one on the jury panel had formed an opinion as to petitioner's guilt or innocence prior to trial. See *Irvin* v. *Dowd*, 366 U.S. 717. The trial judge did not, therefore, abuse his discretion in refusing to grant a change of venue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE 0—1971